THE LAW OF SALES IN THE UNITED STATES.

I have been invited to furnish to the COLUMBIA LAW REVIEW some notes on the above subject from an English and particularly from a Scottish standpoint, and I gladly avail myself of the privilege.

First of all I must express my admiration of the methods recently adopted in the United States for the assimilation of the laws of the different States. The American Bar Association since its formation in 1878 has done noble work, and more recently the Standing Committee on Uniform State Laws has laboured incessantly and with the best results to give practical effect to theories of unification which at the outset seemed to many to be little better than a dream.

To institute a fair comparison between the efforts towards assimilation in the British Isles and the corresponding transatlantic movement it is necessary to call to mind the very different conditions applicable to each case. Each has its own difficulties, but they are different in kind. In Britain there is only one legislature and one supreme Appellate Court, while in the United States I understand that there are more than fifty legislatures and courts of last resort. On the other hand, the American legal traditions are those of English law and the variations therefrom made by the different legislatures and courts do not vary much in principle. It is vastly different as between England and Scotland. The sources of law have trickled down through many centuries in entirely different channels and in many respects the legal principles applicable to each country are still far removed from each other. The Sale of Goods Act of 1893 was in some respects a compromise; in other respects it formed a series of concessions on the part of Scotland which many Scottish lawyers deeply regret. Where the Scottish law is retained it is separately stated in the Act or left to the operation of the common law which was reserved to Scotland by the Act of Union of 1707.

In these circumstances the draft of the Sales Act prepared in 1902-3 by Professor Williston of Harvard at the request of the Commissioners on Uniform State Laws may be studied with interest and profit by the commercial lawyers of the United Kingdom. This draft was carefully considered and amended at successive annual meetings of the Commissioners and finally in 1906 was

recommended for adoption by the different legislatures of the United States. It is upon this draft that I now propose to make some notes. As a Scottish lawyer I have found it extremely suggestive in regard to the principles underlying certain variations between the laws of England and Scotland, and it is possible that having been trained in a legal atmosphere different alike from that of England and America I may be able to contribute something of value either in favour of, or adverse to, the variations which the draft contemplates upon the law of England as embodied in the British Statute.

The points of greatest interest to a Scottish lawyer are naturally those in which the law of Scotland prior to the British Act differed from the law of England and which by the Act have either been reserved to Scotland or yielded to England. Two of these are of outstanding importance, one of which was reserved to Scotland and the other yielded to England.

1. *The English law of warranty in sale.*

This warranty partakes of the nature of the *actio quanti minoris* of the civil law, and forms an exception to the prevailing rule that the law of Scotland follows the Civil Law while the law of England diverges from it. The difference may be expressed thus: In England some obligations of the seller are conditions, a breach of which permits the buyer to reject the goods and rescind the contract, while other obligations are called warranties, a breach of which does not authorise rejection or rescission. In Scotland on the other hand every material part of the contract of sale is a condition, a breach of which entitles the buyer to reject and rescind. The present writer has elsewhere endeavoured to trace the history of warranty in the English Law of Sale and has offered some suggestions as to its value and expediency.[1] The Sale of Goods Act reserves to the buyer in Scotland his former right of rejection and rescission and at the same time restricts the English buyer in accordance with the English common law. The Scottish buyer thus retains his right of rejection and also acquires a new privilege, which he may exercise at his option, of accepting the goods and claiming damages for a breach by the seller of any material part of the contract. The rules now applicable to England and Scotland respectively are set forth in section 11 of the British Act. Opinions may differ as to the propriety of the exceptional privi-

[1] See Juridical Review, vol. xv. pp. 50, 397; vol. xvi, p. 406.

lege given to the Scottish buyer, but it would be difficult to find a Scottish lawyer who would willingly tolerate the doubt and confusion arising from the English distinction between condition and warranty.

Professor Williston in commenting upon sect. 11 of the British Act objects to the use of the word "condition" as "including a promise or warranty." He thinks it unfortunate that "the distinction should become obliterated" for in his opinion "the legal ideas are distinct and should have distinct names." From a Scottish standpoint the distinction is of no practical value, and does not conduce to a clear expression of the law.

It is much more important to notice that the American Draft Act allows rescission as a remedy for breach of warranty.[2] The effect is to bring American law into line with Scottish law, as modified by the British Act. If the remedy of rescission is allowed as regards both condition and warranty, the distinction loses all practical importance. The buyer may continue to call it a warranty if he pleases, but if he exercises his option to rescind he thereby clothes the warranty with the attributes of a condition. The arguments of Professor Williston in favour of rescission[3] are interesting and suggestive, and the experience of Scotland during 14 years of codified statutory law confirms the view that the buyer's option operates no injustice to the seller.

On the footing of a right of election to the buyer the appropriate qualifications and provisions are admirably set forth in section 69 of the American Draft Act. This section is more complete and exhaustive than the corresponding section of the British Act.[4]

It may further be observed that, while in the case of rejection of the goods and rescission of the contract, the buyer in the British Act must notify "within a reasonable time" his intention to rescind, there is no provision in that Act for a similar notification where the buyer retains the goods but proposes to claim damages for defective quality. The absence of a provision of this kind has already caused trouble, particularly in Scotland where the remedy is new. Where a Scottish buyer avails himself of the option to retain defective goods and claim damages, the seller naturally expects, and is entitled to, reasonable notice of the intended claim in order that he may obtain and preserve rebutting evidence. Where notice is not given until after a considerable interval, the

[2] Sect. 69 (1). [3] 16 Harvard Law Review 465.
[4] Sect. 53.

Act affords no guide, and therefore recourse is usually had to the common-law practice of England in the case of a warranty. This, however, is not entirely satisfactory. The English rule as to warranty is embodied in the following words of Lord Loughborough: "No length of time elapsed after the sale will alter the nature of a contract originally false. Neither is notice necessary to be given, though the not giving notice will be a strong presumption against the buyer * * * and will make the proof on his part much more difficult." [5] In the American Draft the difficulty is overcome by requiring notice equally under a claim to reject the goods, and under a claim to keep them and claim damages. In the latter case the provision is in these terms: "If after acceptance of the goods the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor." [6]

If in the case of the seller's breach of warranty a right to rescind the whole contract is given to the buyer, equity dictates that a corresponding right of rescission should be given to the seller where the buyer is in default. This is not provided for in the British Act, but the right is expressly conferred by the American Draft. Section 51 deals with the buyer's liability for failing to accept delivery. It provides to the seller not merely the remedy of damages as in the British Act,[7] but, where the fault amounts to a repudiation or breach of the entire contract, it gives, by reference to the following sections, a right to rescind. Section 53 (1) (*d*) includes rescission among the remedies of an unpaid seller notwithstanding that the property in the goods may have passed to the buyer. Section 61 meets the case of an unpaid seller having a right of lien or having stopped the goods *in transitu,* but the exercise of the right to rescind is qualified by the condition that the seller shall have manifested his intention by notice to the buyer or by some other overt act. Section 65 gives a more general right to the seller to rescind where the goods have not been delivered to the buyer and the buyer has manifested his inability to perform his obligations or has committed a material breach of the contract. In this case also the rescission operates by notice to be given by the seller to the buyer. "As rescission is only an alternative remedy and is in derogation of the contract, a party who wishes to avail

[5] Fielder *v.* Starkin (1788) 1 H. Bl. 17, at p. 19.
[6] Sect. 49. [7] Sect. 37.

himself thereof must manifest his election in some way and must do so without undue delay. Election, once made, determines the plaintiff's rights."[8] It will be observed that the seller's right to rescind is not made to depend on the passing of the property but on the absence of delivery. In this respect it resembles the right of the seller in Scotland prior to the British Act.

The British Act, in lieu of a right to rescind, gives the seller rights of withholding delivery, and of lien and re-sale where the property has passed but the goods have not been delivered, and also rights of stoppage *in transitu* and re-sale where delivery has been given to a carrier.[9] None of these rights imply rescission of the contract,[10] except where the seller expressly reserves a right of re-sale in case of the buyer's default.[11]

2. The English law of transfer of property by intention irrespective of delivery.

This principle is embodied in section 18 of the American Draft Act and in section 17 of the British Act. Prior to 1893 it was unknown in Scotland, and Scottish opinion is not united as to the propriety of yielding to England in this matter. The result, so far as sale is concerned, is to abolish the maxim of the Roman law, *"traditionibus dominia rerum, non nudis pactis, transferuntur,"* which has all along formed part of the common law of Scotland. Transfer of property, irrespective of delivery, is specially inconvenient, in respect that, both in England and in Scotland, it is confined to sale and does not extend to security or donation. It is, however, so firmly fixed in the law of England that the adoption of the Scottish rule was not to be hoped for, and any variance in this matter between the laws of the two countries would have led to varying rules in almost every section of the Act.

While the principle of transfer by intention was, in the circumstances above mentioned, accepted in Scotland, the Scottish lawyer still feels a difficulty in recognising its merits. It is important to observe that in very early times the laws of England and Scotland in this matter were practically identical, and that subsequent divergences were due to alterations in the common law of England. In the days of Glanvill and Bracton in England, and of the *Regiam Majestatem* in Scotland, the Roman law, by which a transfer of property was not complete without delivery, was un-

[8] Professor Williston in 14 Harvard Law Review, 329, 330.
[9] Sect. 39. [10] Sect. 48 (1). [11] Sect. 48 (4).

questioned in either country. The exact period, manner and extent of the first change in the English law is involved in some obscurity. Sir Frederick Pollock cites a case in 1459, and explains it on the theory of "reciprocal grants."[12] Professor Ames puts the date about 1441,[13] while the present writer finds traces of it as early as 1347.[14] In any case, notwithstanding certain suggestions of a learned reporter,[15] there can be no doubt that the principle has governed English law for many centuries, and it is therefore not surprising that in the American Draft Act it is accepted without question.[16] As an abstract question, however, the balance of convenience seems largely in favour of making delivery, rather than intention, the test of the transfer of property in goods. Delivery is an overt act known and read of all men, while intention, so far as third persons are concerned, is an inference often misleading and always uncertain. In the words of an old-time judge, "the thoughts of men are not triable."[17] If the effects were confined to the parties themselves there could be little injustice, for the fault is their own if the intention is not made clear, but third persons, such as security holders and general creditors, have an interest and are often misled by apparent or reputed ownership.

Intention is often so nebulous that rules for ascertaining it are set forth in much the same terms in the American Draft[18] and the British Act.[19] There is, however, one important difference. In the rules referred to, the British Act treats the contract of sale or return as a conditional contract, and places it in the same category as a sale on approval, or on trial, or on satisfaction.[20] As the present writer has elsewhere pointed out,[21] the law both of England and Scotland treats all of these contracts as conditional contracts in the sense of section 1 (2),[22] that is to say, the condition affects the existence of the contract itself as a contract of sale, and is not merely a condition as opposed to warranty and dealt with in the part of the Act headed "Conditions and Warranties."[23] The latter kind of condition forms a term of a contract already in existence. In the former case, neither of the parties, or at most only one of the parties, is bound until the fulfillment of the condition; in the

[12] Contracts, 7th ed., p. 700, note.
[13] 8 Harvard Law Review, 259. [14] 15 Juridical Review 395.
[15] Sergeant Manning, 2 Man. & Ry. 566; 2 M. & G. 691; 1 C. B. 379.
[16] Sect. 18. [17] Brian, C. J., Y. B. 17 Edw. IV 1.
[18] Sect. 19. [19] Sect. 18. [20] Sect. 18 (4).
[21] 17 Juridical Review 223. [22] Sect. 1 (3) Amer. Draft.
[23] Sects. 10 to 15 Brit. Act; Sects. 11 to 16 Amer. Draft.

other case both parties are bound from the first, the condition merely appearing as an incident. The American Draft Act [24] distinguishes between a sale with a right to return, and a sale to take effect on approval or on trial or on satisfaction. Sale or return is treated as a term of an unconditional contract, while the others are treated as in themselves conditional contracts. The argument on which this distinction is based is stated by Professor Williston as follows: "A sale of goods with an option on the part of the buyer to return, *as the title and all beneficial interest are transferred,* necessarily throws the risk upon the buyer, for the impossibility of performing one-half of his alternative promise to return the goods or pay for them cannot excuse non-performance of the other half. On the other hand, when goods are delivered with an option to purchase, as *the buyer has never entered into an obligation to buy,* the risk necessarily remains with the seller. In England this distinction between a 'sale or return' and a 'sale on trial,' important as it is for the correct decision of many questions, has not been brought out by the decisions." [25] It is true that in "sale or return" a beneficial interest is transferred to the buyer, somewhat different from that transferred in the other cases. The buyer may transact with the subject of sale, and may sell at his option either at a higher or a lower price, provided that in the event of a sale of any kind he immediately becomes liable to the original seller for the amount of the valuation put by him upon the goods. It must further be conceded that in the Roman law the contract was treated as a *pactum displicentiæ,* which was resolutive of the contract rather than suspensive of it. On the other hand the points of resemblance seem to outweigh the differences, particularly the fact, common to both, that up to the point of fulfilment of the condition the buyer has not in any way bound himself to become a purchaser of the article. Up to that moment there is, strictly speaking, no contract of sale, and it seems anomalous to transfer property to a person as under a contract of sale, which contract in truth does not exist.

But, apart from the distinction just referred to, the American Draft fails to correct the error, which, in the view of the present writer, characterizes the British Act.[26] In both cases the passing of the property under the conditional sales referred to is presumed to be regulated by the intention of parties, whereas it is really

[24] Sect. 19, Rule 3 (1). [25] 9 Harvard Law Review 110.
[26] 17 Juridical Review 223.

regulated by the terms of the condition itself. The provisions in this respect are, therefore, misplaced in a section dealing only with intention.

Perhaps the leading advantage which the American Draft has over the Act passed for England, Scotland and Ireland, is the definition of "document of title." The formal definition contained in the section appropriated to definitions [27] scarcely differs from the British one imported by reference from the Factors Act of 1889; [28] but the British definition is vague, in respect that, while it appears to give negotiability to every document of title, it does not expressly say so, and, indeed, to hold negotiability as applicable to every one of the various documents expressly specified would not only infer a revolution in the law of England, Scotland and Ireland, but would be unworkable in practice. The consequence has been that the British courts have unduly narrowed the interpretation so as to exclude from negotiability documents which, at least in certain circumstances, are by mercantile practice entitled to the privilege. Another consequence has been that there is prevailing doubt and uncertainty as to the precise legal position of documents of title to goods. The American Draft shows that much consideration has been given to this question, and that all the difficulties have been fully brought under review. Special definitions are given in the body of the Draft, and these are accompanied by detailed rules for ascertaining when a document of title is negotiable and when it is not. Altogether fifteen separate sections which do not appear in the British Act are devoted to this subject.[29] These sections may be recommended to the careful consideration of all interested in the reform of the commercial laws of Great Britain and Ireland.

Naturally, in breaking new ground, the American Draft Act, in so far as it deals with negotiable instruments and documents of title, has not been received by the legislatures of the various States called upon to adopt it with the same unquestioning acceptance that has been accorded to its other provisions. Thus the State of New York has practically adopted the *ipsissima verba* of the draft except in sections 31 to 39, all of which deal with the negotiability of documents of title. The same object is aimed at in both cases, but further consideration seems to have convinced the legal specialists of New York that similar results may be obtained

[27] Sect. 76. [28] Sect. 1 (4). [29] Sects. 26-40.

by improved methods. It would unduly lengthen this paper, and would form a divergence from its main purpose, were we to offer any observations upon the quality of the divergences.

Only a passing reference can be made to minor differences between the American and British law of sales. Taking the American Draft Statute as a basis, the following notes may be of some service.

Section 4 increases the monetary limit under the Statute of Frauds from £10 to £100, or its American equivalent, five hundred dollars. This is a marked improvement. Scotland gets along very well without a Statute of Frauds, and, as Professor Williston observes, " a great deal of fraud is caused by the English statute." The higher limit of value is a compromise between the previous law of those States which have adopted or continued the Statute of Frauds and those which have abolished it altogether.

Section 6 deals with "undivided shares" of goods sold, and has no corresponding section in the British Act. The law as laid down probably does not represent the English law.

Section 7 covers a contingency not provided for in the British Act, viz., deterioration or *partial* destruction of goods sold. The corresponding section of the British Act [30] is followed so far as it deals with total destruction, and a subsection is added to meet the contingency referred to.

Section 9 defines "price," but it differs from the British Act in respect that price is not confined to a monetary consideration, but "may be made payable in any personal property." In other words "barter" comes within the Act. This is an advantage, and sets at rest a long and bitter controversy as to whether or not barter is a species of sale. Mr. Travis, in his work on Sales,[31] devotes a large, and perhaps disproportionate, number of pages to the discussion of the question whether barter and sale are practically the same, or whether they are radically different, but the distinction, though historically interesting, is in the present day more academical than practical.

Section 12 supplies a much needed definition of "express warranty."

The provisions of subsections (2), (3), and (4) of section 20, as to the rights of the holder of a bill of lading, are much more definite and intelligible than anything on the same subject to be found in the British Act, or in the Factors Act of 1889.

[30] Sect. 6. [31] Boston, 1892.

Section 22 (*a*) creates an exception to the ordinary rule that property and risk are transferred to the buyer at the same time. Property "retained by the seller merely to secure performance by the buyer of his obligations under the contract" ceases from the time of delivery to be at the seller's risk.

The general effect of section 25 is much the same as section 25 (1) of the British Act, but it expresses more clearly the principle that, while delivery may not be necessary to pass property as between the parties, it is in many cases necessary in a question with third persons. The subsection secures the rights of special creditors of the seller with the same intention as, but more explicitly than, the British Act. As regards special creditors of the buyer protected by subsection (2) of section 25 of the British Act, it seems that the American law does not provide any such protection, and the subsection is therefore omitted. The general creditors of the seller are protected in case of bankruptcy by section 26, which provides a "reputed ownership" similar to that contained in section 44 of the English Bankruptcy Act of 1883. The present writer has elsewhere ventured to suggest that a similar reputed ownership should be provided for Scotland.[32]

Section 43, relating to the place, time and manner of delivery, differs from the corresponding section of the British Act [33] in two respects, (1) it adds usage of trade as a possible exception to the ordinary rule regarding the place of delivery, and (2) when the goods are in the possession of a third person mere notice to the third person of the fact of the sale is sufficient to operate delivery as against all others than the seller. In the case of the seller the British rule is adhered to, that the obligation to deliver is not fulfilled without an acknowledgment by the third person that he holds the goods on the buyer's behalf. The variation as to persons other than the seller is said to express the existing law of America, and it seems reasonable in view of the more definite negotiability given in that country to documents of title.

Section 44, as to the delivery of a wrong quantity, differs from the British Act [34] in creating a distinction according as the buyer knows, or does not know, that the seller is not going to fulfil the contract in full. If the buyer accepts partial delivery in the knowledge that the seller contemplates a breach of contract in respect of quantity, he must pay for the goods accepted at the contract rate,

[32] Commentaries on British Act 124. [33] Sect. 29.
[34] Sect. 30.

but if the buyer has used or disposed of the goods before the contemplated breach comes to his knowledge he is not liable for more than their fair value.

Section 53 (1) (*a*) is taken verbatim from section 39 (1) (*a*) of the British Act. It gives the unpaid seller "a lien on the goods *or a right to retain them* for the price while he is in possession of them." The words "or a right to retain them" are unnecessary and were not in the original English Bill. It will be remembered that the British Act was before the British Parliament as a Bill for five successive yearly sessions. It was introduced into the House of Lords by Lord Herschell in the Session of 1889, but so near to the close of the session that no progress was made. It was reintroduced in 1890 and passed the House of Lords as a purely English measure, but no attempt was made to proceed with it in the House of Commons. In the interval between the parliamentary sessions of 1890 and 1891 an attempt was made to adapt its provisions to Scotland and accordingly the Bill again appeared before the House of Lords in the Session of 1891 as a proposed measure applicable to the whole of the United Kingdom. Among the adaptations introduced for the purpose of applying the English Bill to Scotland there were references to the Scottish law of retention in the clauses now forming sections 39, 42, 43, 47 and 48 of the British Act, and the Interpretation Clause [35] expressly provided that "lien in Scotland includes right of retention." Now all this was a mistake. The fundamental alteration made in the law of Scotland, by which the property in goods sold passed to the buyer irrespective of delivery, did away with retention except to the extent of the seller's lien. Retention is the right of an undivested owner to retain his property notwithstanding a personal obligation to deliver it to another. The obligation remains personal, while the right of ownership, being real, continues with the seller and enables him as owner to dispose of the goods as he pleases. The adapters of the British Act were probably misled by the terms of the Factors Act of 1889, but that Act was passed on the footing that Scotland maintained its old rule as to the passing of the property. The American Draft very properly expunges the words "or right of retention" where it follows "lien" in other parts of the British Act, but the slightly different phraseology in the section now under notice has led to the superfluous and somewhat misleading words being retained.

[35] Sect. 62 (1).

Section 60, relating to the powers of resale given to the seller where the buyer is in default, differs considerably from the corresponding section of the British Act.[36] In this case, however, the American law does not extend the seller's powers but rather restricts them. The combined effect of the Sale of Goods Act of 1893 and the Factors Act of 1889 is to enable any seller in the United Kingdom having a lien to give a valid title whether the resale or other disposition of the goods is rightly made or not.[37] This is considered too drastic in America, where it is thought that "the requirements as to delivery and change of possession would generally protect the purchaser on the resale." It is, however, made clear in the American Draft and not left to inference as in the British Act, that upon a valid resale the seller is not liable to the original buyer for any profit made by the resale. In America notice is not required of an intention to resell, but except in the case of perishable goods the failure to give notice is relevant in any issue involving the question whether the buyer has been in default an unreasonable time. The British Act requires notice except in the case of perishable goods.[38]

Section 64, relating to damages for non-acceptance, introduces [39] a provision which is not law in the United Kingdom, but which is said to be part of the common law of the United States except in Illinois. It is to the effect that where the buyer repudiates the contract, or notifies the seller to proceed no farther therewith, the seller is bound to cease doing anything further towards carrying out the contract or the sale. The damages are to be fixed as at the date of the repudiation or countermand, and include not only labour or expense or material, but also loss of profit. This provision involves an important legal principle, discussed by Professor Williston in a Review article [40] published before he drafted the Bill. A good case is established for the section as against the alternative course permitted by British law to the party not in breach, and which is stated by Cockburn, C. J., in *Frost* v. *Knight*,[41] in these terms: "The promisee if he pleases may treat the notice of intention to repudiate as inoperative, and await the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance. * * * On the

[36] Sect. 49. [37] See Sale of Goods Act, sect. 48 (2).
[38] Sect. 48 (3). [39] Subsect. (4).
[40] 14 Harvard Law Review 317, 421.
[41] (1872) L. R. 7 Ex. 111.

other hand, the promisee may if he thinks proper treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." The American draft does not in every case permit of the alternative here mentioned, but, on the other hand, it does not require the seller to cease performance in every case of anticipatory breach by the buyer. As Professor Williston remarks: "There may be cases where the damage caused by stopping performance would be greater than that caused by finishing the necessary work." [42] The general principle, however, remains that where a distinct repudiation has taken place before complete performance, the plaintiff should not as a rule be bound or even entitled to continue performance where it would needlessly enhance damages.

In preferring the American law as laid down in section 64 of the Draft Act to the British law, it is not necessary to adopt the argument of Professor Williston contained in the Review article before referred to, to the effect that the British law, and also that of the majority of the American States, errs in principle in permitting an immediate action for an "anticipatory" breach of contract. We have not succeeded in following the reasoning, and are unable to view the seller's duty to mitigate damages as a sufficient reason for separating the contract of sale from any other contract.

Section 76 (1), containing definitions, distinguishes between the words "buyer" and "purchaser." Buyer is defined as in the British Act, and "means a person who buys or agrees to buy goods." This definition is governed by section 75 of the American Draft,[43] which enacts that the provisions of the Act do not apply, unless so stated, to mortgages, pledges or other securities. The word "purchaser" is not used in the British Act, and when used in the United Kingdom as a legal term it is treated as synonymous with "buyer." Before the Sale of Goods Act the words in common use in Great Britain were "purchaser" and "vendee" to the almost total exclusion of "buyer," while since the Act the word "purchaser" has been almost completely superseded by the word "buyer." Under the American definition, however, a new use is

[42] Notes to Draft Act, Sect. 64. [43] Sect. 61 (4) Brit. Act.

found for the now almost discarded term. It is made to include "mortgagee and pledgee" and has therefore a much wider meaning than "buyer." In the Draft Act the word "purchaser" is only used once,[44] but in the New York Act it is also used in sections 31, 33, 34 and 39, all of which relate to negotiable instruments, and differ as we have seen from the model sections of the Draft.

I have only one further remark to make, and this, like the immediately preceding one, arises out of a definition in section 76. "Valuable consideration" is defined as "any consideration sufficient to support a simple contract." No such definition is contained in the British Act, probably because the laws of England and Scotland on the subject are entirely different. Scotland does not divide contract into "simple contract" and "deed under seal," and, what is much more important, it knows nothing of the English doctrine of consideration. No contract in Scotland requires to be buttressed by a form which, though called "consideration" or "valuable consideration" is not necessarily adequate. The present writer has elsewhere discussed this subject in connection with the divergent laws of England and Scotland.[45] In the British Act the phrase "valuable consideration" occurs twice[46] and the word "consideration" on other two occasions.[47] In the first section of the Act "consideration" is not used in its technical sense; section 26 is expressly excluded from operation in Scotland; in section 47 the words "valuable consideration" would in Scotland be interpreted as "adequate consideration"; while in section 54, the phrase "failure of consideration" is introduced only negatively and need not be regarded in a country where consideration in this sense does not exist.

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[44] Sect. 20 (4).

[45] English Doctrine of Consideration in Contract, Glasgow 1891.

[46] Sects. 26 and 47. [47] Sects. 1 and 54.